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No. 96-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ADVANCED COMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

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RULE 29.6 STATEMENT

MCI Telecommunications Corporation is a wholly owned subsidiary of MCI Communications Corporation.

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent MCI Telecommunications Corporation ("MCI") submits this brief in opposition to the petition for certiorari filed by Advanced Communications Corporation ("Advanced"). Advanced seeks review of a judgment of the United States Court of Appeals for the District of Columbia Circuit upholding the Federal Communications Commission's ruling that Advanced had forfeited its Direct Broadcast Satellite (DBS) spectrum because it had failed to satisfy its "due diligence" obligations under the Commission's rules for the DBS service. The petition should be denied.

STATEMENT

The Commission awarded a conditional DBS construction permit to Advanced in 1984. The Commission's DBS regulations required Advanced, among other things,

to begin operating its system "within six years of the construction permit grant." 47 C.F.R. § 100.19(b) (1995). Advanced was unable to meet this requirement and requested an extension, which the Commission granted in 1991. *Advanced Communications Corp.*, 6 FCC Rcd 2269, 2274 (1991). By the time this first extension was due to expire, Advanced still had made no progress toward constructing, much less operating, a DBS system. Advanced thus sought a second four-year extension of its DBS construction permit or, alternatively, authority to assign its permit to a separate entity, Tempo DBS.

To obtain either form of relief, Advanced first had to show that it had complied with its obligation under FCC regulations to "proceed with diligence in constructing" its DBS system. 47 C.F.R. § 100.19(b). Despite clear regulatory language requiring it to "construct[]" a satellite system and to have that system "in operation" before its first permit extension expired, *id.*, and despite having been directly admonished of the need to comply with these requirements when it had received its first extension four years before, *see Advanced Communications Corp.*, 6 FCC Rcd 2269, 2272 (1991), *recon. denied*, 6 FCC Rcd 6977 (1991), Advanced's effort to show diligence was remarkably insubstantial. Advanced cited promotional, marketing, and legal activities, and unsuccessful negotiations with another DBS permittee that had attemped to acquire Advanced's permit, but was unable, fully ten years after receiving its construction permit, to point to "*any* concrete progress toward the actual construction and operation of its DBS system," Pet. App. 33a (emphasis added). Having failed to construct and operate a DBS system through its own efforts, Advanced also asked the Commission to violate its rules by crediting the activities of Tempo, the would-be transferee of Advanced's permit, toward Advanced's own performance requirements. *See* Pet. App. 34a. Not surprisingly, the Commission found that Advanced had *not* satisfied its diligence

obligation and, upon review, the D.C. Circuit upheld the Commission's application of its rules.[1]

Advanced's alternate line of attack below was that *other* permittees had been equally lax, yet had been allowed to transfer or extend their permits. The Commission and the Court of Appeals, however, carefully explained why these other permittees had been more diligent than Advanced. Pet. App. 38a-46a; 6a-7a.

Advanced's petition impugns the *motives* behind the Commission's due diligence ruling, but conspicuously does not attack the *merits* of the Commission's judicially affirmed finding of non-diligence. *See* Pet. 22. In this Court, as before in the International Bureau, the full Commission, and the Court of Appeals, Advanced identifies no basis for a finding of "diligence" in "constructing" its DBS system, regardless of what "standard of review" is applied.

ARGUMENT

This case is an exceptionally poor candidate for Supreme Court review. The decision below was unpublished; it was unanimous; not a single member of the D.C. Circuit called for rehearing *en banc*; and no conflict among the lower courts is even alleged. The "heightened scrutiny" standard petitioner urges for agency decisions that "reclaim" public spectrum that could subsequently be auctioned for the benefit of the U.S. Treasury has never been accepted by any court, and is plainly untenable.

The Court of Appeals applied the correct legal standard to petitioner's claim that the Commission tacitly relied upon an improper factor in reaching its decision. It simply found that the settled presumption of administrative regularity had not been overcome *on the facts of this case*. That determination was correct and presents no reason at all for Supreme Court review.

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[1] Respondent MCI was an intervenor in the Court of Appeals in support of Commission.

The court below expressly declined to pass upon petitioner's proposed construction of 47 U.S.C. § 309(j)(7)(A), properly concluding that this provision had no bearing in the circumstances presented. Petitioner's constitutional arguments in favor of a "heightened" review standard (Pet. 15-21) were not raised before the Commission or the Court of Appeals, and are meritless.

I. THE COURT OF APPEALS CORRECTLY APPLIED SETTLED LAW.

A. The Court of Appeals' Decision That Petitioner Failed to Overcome the Strong Presumption of Administrative Regularity Is Correct and Presents No Issue Calling for Supreme Court Review.

Attempting to conjure a legal controversy from what is merely the application of settled law to particular facts, petitioner mischaracterizes the decision below and asserts that the Court of Appeals believed that agency action may be set aside only when the agency "boldly admits" or "expressly announces" that an improper factor has motivated its decision. *See* Pet. 2, 22-23. The court below held no such thing.

Instead, after citing the familiar and *correct* principle that administrative orders " 'speak for themselves,' " Pet. App. 9a (citation omitted), the Court of Appeals explained that petitioner "ha[d] pointed to nothing in the record that is sufficient to overcome the strong presumption of agency regularity." Pet. App. 9a. The court plainly recognized that the presumption of regularity may be overcome upon the requisite "strong showing of bad faith or improper behavior." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).[2] It simply

[2] Petitioner argues for a different standard by selectively quoting decisions involving substantive constitutional rights not even arguably at issue here. For example, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (discussed in Pet. at 24-26), addressed a claim of intentional racial discrimina-

found that petitioner had not made the necessary showing here. That factbound judgment was correct, and is entirely unworthy of Supreme Court review.

The Court of Appeals had ample reason to reject petitioner's arguments regarding the Commission's motives. The most devastating refutation of petitioner's arguments is Advanced's own dismal performance as a DBS permittee. *See* Pet. App. 29a-46a. Because Advanced had done nothing to satisfy its obligation to *construct* and *launch* DBS satellites, *see* Pet. App. 33a, it would have been surprising, if not capricious, for the Commission to do anything *but* revoke Advanced's permit.

Petitioner repeatedly notes that this was the first and only case in which the Commission stripped a DBS permittee of its permit for failure to satisfy the second part of the due diligence standard. Pet. 25 (inaccurately calling the *Advanced Order* a "policy reversal" for this reason). But as the Commission explained, "[c]onsistency with prior precedent is not determined by whether the same *outcome* had been reached." Pet. App. 28a-29a. Prior permittees had proceeded with diligence; Advanced had not. *See* Pet. App. 5a-8a, 28a-29a, 38a-46a. No policy reversal was involved. The Court of Appeals,

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tion in violation of the Equal Protection Clause; the Court nowhere purported to alter the presumption of regularity attending agency decisions under the Administrative Procedure Act. *See Arlington Heights*, 429 U.S. at 265-66 ("When there is proof that a discriminatory purpose has been a motivating factor in [a governmental] decision, . . . judicial deference is no longer justified."). Except where substantive constitutional rights are at stake, it is simply not the law that this Court has " 'routinely inquired' " into the " 'motivation underlying executive or administrative decisions.' " Pet. 23 (quoting Tribe, American Constitutional Law § 12-5 at 814-15 (2d ed. 1988) (discussing First Amendment and Equal Protection cases)). In administrative law, the presumption has been exactly the reverse. *E.g., Citizens to Preserve Overton Park*, 401 U.S. at 420; *United States v. Morgan*, 313 U.S. 409, 422 (1941). *See also San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44-45 (D.C. Cir. 1986) (*en banc*).

which petitioner does not assert had improper motives, had no trouble upholding the Commission's application of its earlier decisions.

Additional considerations further belie Advanced's claim that the Commission's decision was attributable to an unspoken desire for federal revenue: (i) the Commission's International Bureau found that Advanced had not been diligent months before there was any suggestion that the spectrum in question might be auctioned (*see* Pet. App. 79a-91a), and (ii) both before and after the *Advanced Order*, the Commission *granted* permit extensions or transfer applications in numerous other cases involving valuable spectrum,[8] including cases petitioner claims were "virtually identical" to Advanced's own request (Pet. 25 and n.16). That is hardly the conduct of an agency in the thrall of auction revenues.

B. Petitioner Disregards the Commission's Actual Decision-Making Process.

Petitioner's primary submission is that the court below should have subjected the Commission's decision to "heightened scrutiny" because of "the agency's interest in reclaiming Advanced's spectrum *so that* it would be available for auction." Pet. 14 (emphasis added). But petitioner's premise is false: As the court below recognized, Pet. 9a, the Commission did not rely upon potential auction revenues as a reason for denying Advanced's application to extend or transfer its permit. Even the dissenting commissioners did not argue that the Commission's order was motivated by the prospect of a spectrum auction.

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[8] *See United States Satellite Broadcasting Co.*, 7 FCC Rcd 7247 (Vid. Svc. Div. 1992); *Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680 (1993), *recon. denied*, FCC 95-421 (1995); *Directsat Corp*, 10 FCC Rcd 88 (1993); *Continental Satellite Corp.*, 11 FCC Rcd 1157 (Int. Bur. 1995); *Direct Broadcast Satellite Corp.*, DA 95-2439 (Int. Bur. 1995); *EchoStar Satellite Corp.*, 11 FCC Rcd 3017 (Int. Bur. 1996); *Directsat Corp.*, 11 FCC Rcd 1775 (Int. Bur. 1996), *app. for review pending*, File No. 131-SAT-EXT-95.

Petitioner attempts to support its false premise by confusing the instant permit adjudication with the subsequent notice-and-comment rulemaking proceeding on how to reallocate the spectrum reclaimed from Advanced in the adjudication.[4] In fact, however, these two agency actions were procedurally, substantively, and temporally distinct. The only question before the International Bureau and the full Commission in the *Advanced* permit adjudication was whether to grant Advanced's applications for a permit extension or authority to transfer its permit, a question that turned on whether Advanced had been a "diligent" constructor of a DBS system. *See* Pet. App. 14a-15a; 80a-81a. To rule on those applications, the Commission did not need to, and did not, decide how it would reassign spectrum reclaimed from Advanced. *That* issue was not resolved until the conclusion of the subsequent rulemaking proceeding, in which the Commission exhaustively considered both auction *and* non-auction methods of redistributing the reclaimed spectrum. *See Auction Order*, 11 FCC Rcd at 9763-9773. The proper forum for any claims that the Commission's decision to hold an auction violated its auction authority was the rulemaking proceeding in which the Commission actually proposed, considered, and ultimately adopted an auction—*not* the prior adjudication over Advanced's entitlement to a second permit extension.

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[4] *See Notice of Proposed Rulemaking, Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 1297 (rel. Oct. 30, 1995); *Revision of Rules and Policies for the Direct Broadcasting Satellite Service*, 11 FCC Rcd 9712 (rel. Dec. 15, 1995) ("*Auction Order*"). The validity of the Commission's *Auction Order*, including the Commission's decision to rely on competitve bidding as the means for reallocating the spectrum formerly held by Advanced, is presently before the Court of Appeals. *See DIRECTV v. FCC*, No. 96-1001 (D.C. Cir. argued Oct. 1, 1996). Advanced did not file a petition for review or otherwise participate in that proceeding.

II. PETITIONER'S ARGUMENT FOR "HEIGHTENED SCRUTINY" FINDS NO SUPPORT IN FEDERAL STATUTES OR THE CONSTITUTION.

A. Petitioner's Proposed "Heightened" Standard of Review Has No Basis in the Administrative Procedure Act.

As the Court of Appeals noted, its review of the Commission's order was subject to the familiar "arbitrary [or] capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Pet App. 5a. APA review is deferential, both as to factual judgments, *e.g., Consolo v. FMC*, 383 U.S. 607, 620 (1966), and legal judgments, *e.g., Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Petitioner's proposed "heightened review standard" has no place in this scheme.

Petitioner's argument depends entirely on the assumption that the Commission accorded dispositive weight to potential auction revenues, even though the Commission's order on its face was predicated entirely upon Advanced's failure to comply with the Commission's DBS regulations, It is settled law that, absent "a *strong showing* of bad faith or improper behavior," *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. at 420 (emphasis added), agency decisions stand or fall based upon the reasoning given by the agency. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). As the court below put it, " '[a]gency opinions, like judicial opinions, speak for themselves.' " Pet. App. 9a (quoting *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994)). "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co.*, 470 U.S. at 743-44 (citation omitted). Agency adjudicators are " 'assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of

its own circumstances.' " *Withrow v. Larkin*, 421 U.S. 35, 55 (1975) (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)). Courts are not authorized to " 'probe the[ir] mental processes.' " *Morgan*, 313 U.S. at 422 (citation omitted). "Just as a judge cannot be subjected to such a scrutiny[,] so the integrity of the administrative process must be equally respected." *Id.*

Petitioner's apparent position, however, is that the Commission's decision should have been subject to "heightened scrutiny" even *without* a "strong" threshold showing of "bad faith or improper behavior." But there is no basis in the APA or cases under it for a special departure from the "arbitrary or capricious" standard and the attendant presumption of regularity. Petitioner does not cite a single case under the APA in which a court was willing to jettison the presumption of agency good faith. As shown below, petitioner's efforts to ground their proposed presumption of *irregularity* in the auction statute itself or in the Due Process Clause are equally unavailing.

B. Section 309(j)(7)(A) Is Irrelevant to This Case, and Does Not Support Any "Heightened Review Standard."

Petitioner's argument for a "heightened review" standard is predicated in large part upon 47 U.S.C. § 309(j)(7)(A). Petitioner contends that § 309(j)(7)(A) categorically prevents the Commission from considering potential auction revenues. *See* Pet. 13, 15-17, 23. The Court of Appeals, however, recognized that petitioner's reliance upon § 309(j)(7)(A) was misplaced, because the Commission had *not* in fact relied upon auction revenues when it declined to extend ACC's permit. Pet. App 9a.[6] But even if petitioner were correct that § 309(j)(7)(A) comprehensively bans the Commission from considering auc-

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[6] The court was careful, however, to "express no opinion as to whether the Commission was in fact barred by law from taking into account the expected impact on federal revenues." Pet. App. 9a.

tion revenues, that provision would not create an extraordinary review standard requiring judges to second-guess the Commission's motives even when the Commission does not purport to have relied on auction revenues. Petitioner's argument depends upon a patent misreading of § 309(j)(7)(A), which does not even apply to FCC adjudications concerning performance requirements and license conditions. The proposition that § 309(j)(7)(A) somehow limits the Commission's power to reclaim Advanced's spectrum is also inconsistent with 47 U.S.C. § 309(j)(6)(C), which provides that "[n]othing in [§ 309(j)], or in the use of competitive bidding, shall . . . diminish the authority of the Commission, under the other provisions of this chapter to regulate or reclaim spectrum licenses."

Petitioner fails to show why § 309(j)(7)(A) should be construed to overrule, *sub silentio*, the ordinary and longstanding presumption that agencies in good faith report the reasons underlying their decisions. *See supra*, pp. 8-9. Advanced asks this Court to create an unorthodox new review standard based upon a construction of § 309(j)(7)(A) that no court has ever accepted, that the court below explicitly refused to pass upon, and that is contrary to the text of the auction statute itself.

C. Petitioner's Constitutional Arguments Were Not Raised Before the Commission or the Court of Appeals and Are Meritless.

Petitioner also argues that the Due Process Clause mandates its special "heightened review standard." Pet. 15-21. But in its briefs and oral argument in the Court of Appeals, petitioner did not rely upon the Due Process Clause or any other constitutional provision, and did not cite the cases on which it now relies. *See* Pet. 15-17 (citing *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust of So. Cal.*, 508 U.S. 602 (1993); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Withrow v. Larkin*, 421 U.S. 35 (1975); *Ward v. Village of Mon-*

roeville, 409 U.S. 57 (1972), and *Tumey v. Ohio*, 273 U.S. 510 (1927)). Accordingly, the Court of Appeals did not address any constitutional claims. Petitioner's constitutional contentions are not properly before the Court. *See, e.g., United States v. Williams*, 504 U.S. 36 41 (1992).

Even if petitioner's new argument were properly before the Court, it is meritless. The possibility that the Commission, by ruling adversely on an application to extend a permit or approve a transfer, could make spectrum available for competitive bidding, does not even remotely present the risks of a personal or institutional bias sufficient to implicate the Due Process Clause.

First of all, petitioner does not and could not assert that any FCC Commissioner or employee had a *personal* financial stake in the outcome of this proceeding. *Cf. Tumey v. Ohio*, 273 U.S. 510 (1927) (striking down scheme under which an Ohio mayor received a portion of any fines he assessed as part of his compensation); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (optometrists on licensing board could not neutrally adjudicate complaint against their economic competitor); *Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust of So. Cal.*, 508 U.S. 602, 617 (1993) (noting danger of bias stemming from ERISA trustees' fiduciary duties to plan beneficiaries and personal liability for underfunding).

Nor is there reason to fear that the Commission would set aside its neutrality in hopes of "profiting," Pet. 6, 17, by subsequently holding an auction. The auction statute provides that "all proceeds from the use of a competitive bidding system . . . shall be deposited in the [United States] Treasury in accordance with chapter 33 of Title 31." 47 U.S.C. § 309(j)(8)(A). The only exception is that "the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from [auction] proceeds for the cost of de-

veloping and implementing the program required by this subsection." § 309(j)(8)(B).

Because auction revenues go to the United States Treasury rather than the Commission, and because the FCC is in no way dependent upon auction revenue for its existence, petitioner's reliance on *Ward v. Monroeville*, 409 U.S. 57 (1972), is misplaced. In *Ward*, the town mayor was responsible both for managing town finances and for adjudicating ordinance violations and traffic offenses; the record showed that the fines the mayor assessed constituted between one-third and one-half of the town's annual revenues. *Ward*, 409 U.S. at 58-59. The *Ward* Court, citing *Tumey*, held this combination of functions unconstitutional because "the mayor's executive responsibilities for the village finances may make him partisan to maintain the high level of contribution from the mayor's court." 409 U.S. at 60.

In contrast to the situation in *Ward*, all net revenues from FCC auctions go to the Treasury, over which FCC Commissioners have no special administrative or political responsibility. And whereas the fines assessed in *Ward* constituted a substantial portion of total town revenues, the sums obtained from FCC auctions—particularly the small sub-set of auctions in which the spectrum at issue was *reclaimed* from a permittee—constitute a minuscule portion of total federal revenues. *Cf. Marshall v. Jerrico, Inc.*, 446 U.S. at 250-51 (observing that civil penalty assessments channeled to agency's enforcement division accounted for less than one percent of division's budget and that enforcement agents were "in no sense financially dependent on the maintenance of a high level of penalties").

Petitioner suggests, however, that the Commission's right to retain a portion of auction revenues to cover auction-related administrative costs, 47 U.S.C. § 309 (j)(8)(B), is sufficient to trigger "heightened scrutiny" under the Due Process Clause. Petitioner reasons that

"were [the Commission] to allocate the spectrum by other means, the cost would come out of its budget." Pet. 16. Under petitioner's "administrative costs" rationale, however, the Commission could just as likely have been "biased" in favor of *granting* Advanced's extension application, since it could thereby have avoided any need for reallocation and associated expenses.

If the Commission's ability to avoid the costs of an alternative spectrum reallocation procedure was enough to trigger "heightened scrutiny," then *any* agency decision that saves administrative resources (*e.g.*, decisions to forgo enforcement actions, to close a regional office, to rely on private market forces rather than regulation, or to assess fees from regulated parties) would be subject to such scrutiny. No court has held that the Constitution requires exceptionally probing review of an agency's decision whenever the decision saves resources. To the contrary, conservation of administrative costs is ordinarily an entirely legitimate factor for an agency to consider. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

Even more implausible is petitioner's contention that the Commission's decision should be subject to strict scrutiny because of the Commission's "institutional interest in generating auction revenues" for the United States Treasury. Pet. 17. Petitioner speculates that, because Congress favors auctions and controls the Commission's funding, the Commission can be presumed to skew its normal decisional processes to maximize the opportunities for holding auctions. *See id.* Petitioner's "institutional interest" theory is truly boundless, since it would require "heightened" judicial review whenever the agency had done something apt to please Congress (and thereby, at least potentially, to increase the agency's future appropriations).

Federal courts have never taken such a cynical view of agency administrators or their legislative overseers.

Like courts, agencies commonly confront controversial issues about which Congress and the public have strong views. Yet it has never been held that an agency's generalized interest in maintaining funding or congressional approbation triggers "heightened scrutiny." Administrators are presumed to be capable of basing their decisions on the evidence and the law before them. *See Schweiker v. McClure*, 456 U.S. 188, 196 n.9 (1982). They are "not assumed to be flabby creatures any more than judges are." *Morgan*, 313 U.S. at 421. It remains open, of course, for a challenger to make a showing that Congress has exercised undue influence in a particular agency proceeding. *Cf. ATX, Inc. v. United States Dep't of Transp.*, 41 F.3d 1522, 1527-28 (D.C. Cir. 1994); *Pillsbury Co. v. FTC*, 354 F.2d 952, 963-65 (5th Cir. 1966).[6] But the *presumption* of regularity casts the burden on the challenger to make that showing.

Petitioner provides no reason in logic or law why the proposed "heightened review standard" should be limited to "FCC decisions to reclaim spectrum for auction." Pet. 18.[7] Under petitioner's rationale, *any* order or rule that could ultimately produce a benefit for the United States Treasury should be presumptively suspect, whether it be an Internal Revenue Service ruling denying a claim of tax exemption; a Veterans Administration determination that an individual or class does not qualify for benefits; or a Department of the Interior regulation raising the fees for use of federal lands.

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[6] Petitioner evidently does not now assert an independent claim of undue congressional interference with the adjudicative process before the FCC; nor does petitioner quarrel with the D.C. Circuit's standard for evaluating such claims. *See ATX, Inc.*, 41 F.3d at 1527-28 (cited in Pet. at 18).

[7] Petitioner's reasoning would require heightened scrutiny of any FCC decisions regulating the performance of licensees, because enactment of strict regulations or performance requirements would predictably increase the incidence of permittee forfeiture and hence the potential for redistribution of reclaimed spectrum by auction.

Nor does petitioner provide any reason why its proposed standard should be confined to agency decisions. If the potential for gain to the United States Treasury were enough to create a cognizable risk of "bias," every judicial ruling (and every statute) that benefits the Treasury would be subject to heightened scrutiny. *Cf.* 2 Davis & Pierce, Administrative Law Treatise § 9.8 at 71 (1995). In short, petitioner's "heightened review standard" is as unworkable as it is unsupported by precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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